No. 260. A.

(Br. of Johnson & Hamilton for D. & C. (on mo.)

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

Filed April 8, 1901.

No. 260.

ANNA R. KEAN,
Plaintiff in Error,

vs.

THE CALUMET CANAL AND IMPROVEMENT COMPANY,
Defendant in Error.

STATEMENT BY DEFENDANT IN ERROR IN OPPOSITION TO MOTION FOR CONTINUANCE.

WILLIAM O. JOHNSON,
WILLIAM JOHNSTON,
SOLICITORS FOR DEFENDANT IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

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MAY IT PLEASE THE COURT:

Now comes The Calumet Canal and Improvement Company, defendant in error, by William O. Johnson and William Johnston, its solicitors, and objects to the granting of the motion of plaintiff in error for a continuance of the above entitled cause, and as the reasons for its said objection the said defendant in error respectfully submits the following:

1. The suit is a controversy concerning the title to certain lands conveyed to the State of Indiana by the United States under the swamp land act of 1850; said

lands being located in Lake County, Indiana, adjoining the state line and contiguous to the City of Chicago. Said land is very valuable, and the action of plaintiff in error creates such a cloud upon the title that the defendant cannot sell and dispose of the land during the pendency of this appeal.

2. Great delay has already been occasioned by the plaintiff in error in this case, and the defendant in error has, by reason of the pendency of this suit, been hindered and delayed in the sale and disposition of this land for more than six years.

3. This action was commenced in the Circuit Court of Lake County, Indiana, on January 16, 1895. Afterwards, the plaintiff in error took a change of venue to the Circuit Court of Porter County, Indiana, wherein the said cause was prosecuted to a final determination and a decree therein rendered in favor of the defendant in error on November 5, 1895. Afterwards, plaintiff in error prosecuted an appeal to the Supreme Court of the State of Indiana, wherein the decree of the lower court was affirmed by the opinion of the Supreme Court of Indiana rendered on the twenty-sixth day of April, 1898, which said opinion is reported in Volume 150 of the Reports of the Supreme Court of Indiana, at page 699 thereof, the cause being there entitled "*Mason et al. versus The Calumet Canal and Improvement Company*," a true copy of which said opinion is hereto attached in the form of an appendix for the convenience of this Honorable Court.

4. Defendant in error says that there has already been unreasonable delay in prosecuting this appeal; that said appeal is causing it great and irreparable damage, and that it believes and so asserts that there is absolutely no merit in the claim of the said plaintiff in error.

5. There is not, in the motion of the said plaintiff in error for a continuance, sufficient reason assigned.

6. There is no assurance that the plaintiff in error will ever be able and willing to comply with the rules of this court in the matter of the printing of the record herein. Said motion for a continuance is based upon no rule of this court and no principle of law, and the defendant in error therefore insists that the said motion of the plaintiff in error for a continuance be denied.

Very respectfully submitted.

THE CALUMET CANAL AND IMPROVEMENT COMPANY,
Defendant in Error,
By WILLIAM O. JOHNSON,
WILLIAM JOHNSTON,
Solicitors for Defendant in Error.

E. Hamilton
of Counsel

APPENDIX.

(*Mason et al.* v. *Calumet Canal & Improvement Co.*—Supreme Court of Indiana, April 26, 1898.)

Opinion.

Howard, C. J.: This was an action brought by appellee against appellants and others, to quiet title to certain real estate described in the complaint, and situated in S. ½ section 18, and section 19, township 37 N., range 9 W.; and in sections 12, 13, and 24, township 37 N., range 10 W., in Lake County. The lands in controversy, together with other lands, were conveyed to the State of Indiana by the United States, under the swamp land act of 1850, and by the description of the government survey of 1834. By the same descriptions, the lands were conveyed by the state to the remote grantors of appellee. Part of the lands are included in what was once the bed of Wolf Lake and the bed of Lake George; but, since the survey, the waters have, in large measure, receded, leaving the lake beds comparatively dry land. In 1875, certain persons, under the assumption that the beds of the lakes had not been surveyed in 1834, procured a resurvey of that part of the lands formerly covered by the waters; and it is through this last survey, and the sales made in pursuance thereof, that appellants claim title. The case before us, therefore, in so far as concerns source of title, does not differ from that of *Kean* v.

Roby, 145 Ind., 221, 42 N. E., 1011. On the authority of the decision in that case, there can be no question that the resurvey of 1875, as also the sales made thereunder, was wholly invalid, and, consequently, that appellee's title, as based upon the original survey of 1834, and the sales made under that survey, is good. No real distinction in this regard has been shown between the two cases.

The second contention is that the action is barred by the fifteen and the twenty years' statute of limitations. This contention is plainly founded upon the same theory as the first, namely, that the appellants obtained some title or took possession of some kind under the void survey of 1875. As to title, as we have seen, there was none. As to possession, the court heard the evidence, and did not find, nor can we perceive, that the continuous and lawful possession of appellee and its immediate and remote grantors was ever broken by the unauthorized entrance, if any there was, on the part of appellants, or any of them. Appellee and its grantors continued to pay the taxes assessed on the lands, by the descriptions in their deeds coming down from the original government survey, and had at all times such possession of and exercised such dominion over the territory as was possible in the case of wild, wet and uncultivated lands. As said by this court in *Worthley* v. *Burbanks*, 146 Ind., 534, 45 N. E. 779, it is manifest that as to adverse possession there can be no absolutely unvarying rule with reference to every kind of real estate. The requirement as to the kind of occupancy of or dominion over land which is necessary to show adverse possession in the case of a cultivated farm, a town lot, or a residence in a populous city, may be quite inapplicable or even impossible in the case of a piece of desert land, a mining claim, a non-navigable

lake, a prairie, or a forest. The evidence in this case, as we think, was sufficient to show continuous possession by appellee and its grantors of the lands in controversy. The appeal as to Henry B. Mason has been dismissed on his petition, and the contentions made in the brief filed in his behalf need not therefore be considered. Judgment affirmed.